Office - Supreme Court, U.S.
FILED
DEC 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

REPLY OF PETITIONERS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana
DAVID MICHAEL WALLMAN
Deputy Attorney General
DONALD P. BOGARD
Special Counsel
Attorneys for Petitioners

219 State House
Indianapolis, Indiana 46204
(317) 232-6210

Central Publishing Company, Inc., Indianapolis, IN 46206

TABLE OF CONTENTS

	PAGE
Argument	1
Conclusion	6

TABLE OF AUTHORITIES

CASES	PAGE
Evans v. Buchanan (3d Cir. 1978), 582 F.2d 750	5
Insurance Group Committee v. Denver & Rio Grande R.R., 329 U.S. 607 (1947)	3
Milliken v. Bradley, 418 U.S. 717 (1974)	2
U.S.A. v. Board of School Comm. (S.D.Ind. 1971), 332 F.Supp. 655	1
U.S.A. v. Board of School Comm. (S.D. Ind. 1975), 419 F.Supp. at 188	2
U.S.A. v. Board of School Comm. (S.D.Ind. 1978), 456 F.Supp. 182	3
U.S.A. v. Board of School Comm. (7th Cir. 1976), 541 F.2d 1211	3
U.S.A. v. Board of School Comm. (7th Cir. 1980), 637 F.2d 1101, *cert. denied* 101 S.Ct. 114	1, 3
U.S.A. v. Board of School Comm. (7th Cir. 1982), 677 F.2d 1185	5
U.S.A. v. Board of School Comm., 101 S.Ct. 114 (1980)	2

CONSTITUTIONAL AND STATUTORY PROVISIONS

	PAGE
Tenth Amendment, Constitution of the United States of America	3, 4
IC 20-8.1-6.5-1 *et seq.* (Transfer Statute)	2, 4, 5
IC 36-3-1-1 *et seq.* (Uni-Gov)	1

ARGUMENT

Come now Petitioners Robert D. Orr, as Governor of the State of Indiana; Linley E. Pearson, as Attorney General of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; the Indiana State Board of Education, a public corporate body; and all additional state officials who have been duly served and joined as party-defendants below, and file this Reply to the contentions raised by the various Respondents in this Court.

1. All Respondents rely upon the theory that only the State of Indiana was responsible for the interdistrict violation which necessitated the desegregation order. This case was commenced in May of 1968 by the Justice Department against Indianapolis Public Schools (IPS) only. The District Court found that IPS had committed acts of *de jure* segregation in 1954 at the time of this Court's *Brown* decision and in 1968 at the time the case was brought, 332 F.Supp. 655 (S.D.Ind. 1971). The State was not a party to the original action which produced these findings, although the District Court later ruled that all added parties were bound by them. Indeed, the Justice Department never sought a remedy against the State. It is, therefore, clear that but for the actions of IPS in 1954 and 1968 this case would not be before the Court at this time. The passage of Uni-Gov, IC 36-3-1-1 *eq seq.*, the sole basis of State liability, occurred in 1969 and became effective in 1970. Respondents' contention that the State violation forms the basis of the remedy ignores the fact that the IPS violations precipitated the suit and carried it to this juncture. The Seventh Circuit clearly recognized that Marion County was segregated *prior* to enactment of Uni-Gov, 637 F.2d 1101 at 1107 (7th Cir. 1980).

2. Lawrence Respondents maintain that the State has been a party to the creation of the substantive decree and

that it is in some way unusual for State Petitioners to be concerned for the rights of black parents and students. Petitioners would submit that they, and their predecessors in office, consistently opposed the creation of a substantive plan which extended beyond the boundaries of IPS, the only segregated Marion County school district. Indeed, State Petitioners joined in Respondents' opposition to this plan up through this Court's denial of certiorari in 1980, 101 S.Ct. 114 (1980). Petitioners would submit that they, by their consistent action throughout this appeal, have not waived, as Lawrence Respondents allege, the opportunity to point out to this Court the inherent and obvious denial of substantive rights to black parents that is supported by the decree which is the subject of this Petition.

There is *no* school desegregation case or precedent from this Court which, like the District Court's order below, approves the judicial *creation* of school districts where black parents are excluded from school board membership, denied the right to vote for school board members, or denied the substantive rights regarding school governance available to white parents. Respondents' contention that judicial approval of a financing mechanism which insulates all the parties "restores the victims of past discrimination" is unsupportable when that decree solidifies a substantive order which is patently discriminatory.

3. Lawrence Respondents suggest that application of the Indiana Transfer Statute, IC 20-8.1-6.5-1 *et seq.* is in some way impossible after this Court's determination in *Milliken v. Bradley*, 418 U.S. 717 (1974). Respondents' position is incorrect and, in any event, is unavailable to them at this time. The District Court specifically found the three (3) statutory predicates for application of the Transfer Statute on three (3) occasions *subsequent* to this Court's *Milliken* decision, 419 F.Supp. at 184 (S.D.Ind. 1975); an unpublished decision of June 2, 1978; and 456

F.Supp. at 191 (S.D.Ind. 1978). The Seventh Circuit noted that the Transfer Statute would obligate IPS to participate in financing metropolitan desegregation some two(2) years after *Milliken*, 541 F.2d 1211 at 1215 n.2 (7th Cir. 1976). In 1980, without reversing the District Court's findings, the Seventh Circuit concluded only that the Transfer Statute did not provide *independent* authority to order student transfers; that it provided simply a procedural mechanism to pay for transfers ordered due to unconstitutional segregatory acts, 637 F.2d at 1112 (7th Cir. 1980). These findings now constitute the law of the case. *Insurance Group Committee v. Denver & Rio Grande R.R.*, 329 U.S. 607 at 612 (1947).

4. Respondents Lawrence and IPS also suggest that the Transfer Statute is inapplicable due to the context of its passage in 1974. Petitioners would submit that in Indiana there is no precedent for using speculation regarding the circumstances surrounding a state statutory enactment to void that enactment when, as here, the statute is applicable on its face and formal legislative history is not recorded.

5. Lawrence Respondents, ignoring the fact that the Transfer Statute obligates the State of Indiana to participate in the payment process, continue to characterize application of the Transfer Statute as unfair. Presumably, this contention is based upon the argument that Indiana has no authority to structure its own finances. Assuming, for purposes of argument only, that Lawrence Respondents are correct and only the State is responsible for metropolitan segregation in Marion County, the question remains regarding Indiana's Tenth Amendment authority to apportion its costs in any manner it chooses. If a judgment is so large as to require an increase in taxes, it is patently beyond the authority of the judiciary to void the decision of the Legislature as to what segment of society is to bear that tax burden absent some serious and independent constitutional defect. In the case at bar,

Petitioners would submit that a judicial finding of culpability in any case is superfluous when the State has exercised its sovereignty in determining the manner of payment. As a general concept, the federal nature of our government, and the remaining sovereignty posited by the Tenth Amendment, permit the State to, in effect, pass liability in a manner of its own choosing. The Transfer Statute, which does no more than obligate the State to participate in and, in essence, to bear the entire cost of interdistrict desegregation if the parties are unable, presents no independent constitutional defect which would authorize the federal judiciary to void the enactment and prevent its application.

6. Lawrence Respondents also incorrectly claim that the Tenth Amendment protection extends only to taxing issues and the Transfer Statute is not such a statute. Petitioners would submit that to the extent that the Transfer Statute calls for the expenditures of public funds and specifically calls for the placement of the costs on both the State of Indiana and the involved school systems, it does indeed come within the ambit of state sovereignty assured by the Tenth Amendment. Neither the Tenth Amendment nor the reported cases construing it indicate that a mechanical or formal approach is to be utilized in determining whether the activity in question comes within the parameters of Tenth Amendment authority.

7. Lawrence Respondents incorrectly claim that Petitioners have abandoned any effort to make IPS or the Housing Authority of the City of Indianapolis (HACI) responsible for payment, and instead seek to make the suburban school systems responsible. Petitioners have consistently contended simply that the Transfer Statute is applicable and that ignoring the HACI violation and the responsibility of the suburbs by placing the entire burden upon the State of Indiana is inequitable and unjust. Judge Posner, in dissent, stated succinctly the attitude and

involvement of the suburbs and their elected representatives in enacting the statute which comprised the "state violation," 677 F.2d at 1193.

8. Respondents, particularly Respondent Indiana State Teachers Association (ISTA), seriously misconstrue both the evidence and the impact of Petitioners' contentions. ISTA claims that Petitioners' contentions will make former IPS students who suffered from past IPS discrimination responsible for paying for the present remedy. The ISTA position not only rests upon broad and unwarranted assumptions regarding material not in evidence, but seriously mischaracterizes the impact of the Transfer Statute. The Transfer Statute recognizes that an involved school corporation will have certain cost savings from the transfer of students from its system. The statute provides a calculation to determine if such savings exist, IC 20-8.1-6.5-3. When such savings do not exist, and the receiving schools have no funds budgeted to pay the costs, then the Transfer Statute obligates the State to make loans, grants, or advances. Also, since the State already provides approximately fifty-one percent (51%) of the IPS operating budget, there is no legal prohibition on IPS seeking an added appropriation from the General Assembly for any such expenses. The adverse impact suggested by Respondents upon those past victims of discrimination is illusory.

9. All Respondents cite a litany of reported desegregation cases in support of the proposition that it is proper to have a state participate in financing a desegregation remedy. Those cases, however, are inapplicable to the central question in this action because *none* of them involved a state's effort to provide a workable financing method by legislative action. In this regard, this case is one of first impression for this Court, the Seventh Circuit result being at variance with the approach taken by the Sixth Circuit in *Evans v. Buchanan*, 582 F.2d 750 (3rd Cir. 1978).

10. The Lawrence Respondents acknowledge that they had no standing to petition the District Court for an order compelling the State to pay all costs of desegregation when they state on page 4 of their Brief that the Transfer Statute "if applicable would have placed the majority of these costs on IPS and limited the State's liability to essentially one-half of the costs of transportation." Thus, the suburban respondent school corporations (movants below) would not have incurred any financial liability. Lawrence Respondents also acknowledge on page 9 of their Brief that IPS did not file the petition to have the State assume all costs of financing.

CONCLUSION

For the foregoing reasons, Petitioners pray that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana
DAVID MICHAEL WALLMAN
Deputy Attorney General
DONALD P. BOGARD
Special Counsel
Attorneys for Petitioners

219 State House
Indianapolis, Indiana 46204
(317) 232-6210